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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE ROMAN CATHOLIC DIOCESE OF NASHVILLE, TENNESSEE, AND FATHER RYAN HIGH SCHOOL, SUPPORTING RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE TSSAA's ENFORCEMENT OF ITS RECRUITING RULE CONSTITUTED STATE ACTION TO WHICH FIRST AMENDMENT PROTECTIONS APPLY 7

A. There Is No Basis to Reconsider *Brentwood I* 8

B. Brentwood Did Not Voluntarily Surrender Any Measure of First Amendment Protection by Participating in the TSSAA 10

II. PROPERLY SCRUTINIZED, THE TSSAA'S RECRUITING RULE FAILS CONSTITUTIONALLY 16

A. The Recruiting Rule Is Void for Vagueness and Overbreadth 16

B. The Recruiting Rule as Applied by the TSSAA to Brentwood Is Unconstitutional 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Baggett v. Bullitt,
377 U.S. 360 (1964) 22

Board of County Comm'rs v. Umbehr,
518 U.S. 668 (1996) 11

Brentwood Academy v. TSSAA,
304 F. Supp. 2d 981 (M.D. Tenn. 2003) 16, 24

Brentwood Academy v. TSSAA,
442 F.3d 410 (6th Cir. 2006) 6

Brentwood Academy v. TSSAA,
531 U.S. 288 (2001) 8, 9, 10

City of Houston v. Hill,
482 U.S. 451 (1987) 18, 19, 21

Connick v. Myers,
461 U.S. 138 (1983) 11, 12

Garcetti v. Ceballos,
126 S. Ct. 1951 (2006) 11

Gentile v. State Bar of Nev.,
501 U.S. 1030 (1991) 18

Grayned v. City of Rockford,
408 U.S. 104 (1972) 22

Griffin v. Md.,
378 U.S. 130 (1964) 10

Griffin v. Wis.,
483 U.S. 868 (1987) 20

Keyishian v. Board of Regents of NY,
385 U.S. 589 (1967) 17

Kolender v. Lawson,
461 U.S. 352 (1983) 21, 22

Lambert v. Cal.,
355 U.S. 225 (1957) 20

Legal Services v. Velasquez,
531 U.S. 533 (2001) 12, 15

NAACP v. Button,
371 U.S. 415 (1963) 17

NCAA v. Tarkanian,
488 U.S. 179 (1988) 9

Pennhurst State Sch. & Hospital v. Halderman,
451 U.S. 1 (1981) 18

Pickering v. Board of Education Of Twp. High Sch. District 205, Will County,
391 U.S. 563 (1968) 11

Rosenberger v. Rector & Visitors of University of Va.,
515 U.S. 819 (1995) 12

Rust v. Sullivan,
500 U.S. 173 (1991) 13

Sec'y of State of Md. v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 19

Sherbert v. Verner,
374 U.S. 398 (1963) 14

Smith v. Pro Football, Inc.,
593 F.2d 1173 (D.C. Cir. 1978) 24

Snepp v. United States,
444 U.S. 507 (1980) 12

Speiser v. Randall,
357 U.S. 513 (1958) 4, 14

Tory v. Cochran,
544 U.S. 734 (2005) 18

United States v. America Library Association,
539 U.S. 194 (2003) 13

Vaca v. Sipes,
386 U.S. 171 (1967) 18

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 17

Wood v. National Basketball Association,
809 F.2d 954 (2d Cir. 1987) 24

STATEMENT OF INTEREST[1]

The Roman Catholic Diocese of Nashville ("Diocese of Nashville") is a diocese that includes 38 counties in the middle region of the State of Tennessee. Founded in 1837, the diocese includes twenty-two independent schools serving approximately 6,400 students, including three high schools with nearly 2,000 students. The mission of the schools in the Diocese of Nashville is to promote quality education in the Catholic tradition. All of the secondary schools in the Diocese of Nashville are members of the Tennessee Secondary School Athletic Association ("TSSAA").

Father Ryan High School, Inc., one of the schools in the Diocese of Nashville, is a coeducational, independent, secondary school located in the Oak Hill area of Nashville, Tennessee. The school is dedicated to providing an exemplary educational experience aimed at fully developing the creative, intellectual, spiritual, athletic, and social maturity of each of its approximately 900 students. Founded in the 1920s, Father Ryan High School currently has an athletic program that includes a variety of interscholastic competitive sports activities, including football, basketball, soccer, baseball, track, cross country, and volleyball. Father Ryan High School participates as a member of the TSSAA because interscholastic athletic competition is an important aspect of the educational experience for many of the school's students and because there are no other realistic options for a secondary school in Tennessee to engage in interscholastic athletics.

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[1] The parties have consented to the filing of this *amicus* brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that none of the parties or their counsel wrote this brief in whole or in part and that no one other than *amici* made any monetary contribution to the preparation or submission of this brief.

Both the Diocese of Nashville and Father Ryan High School have an abiding interest in ensuring that this country's long tradition of protecting First Amendment speech rights is not undermined by efforts, such as those by the TSSAA in this case, to impose restrictions on those freedoms needlessly. Independent schools like Father Ryan and the other schools in the Diocese of Nashville rely on accurate and personal communications with prospective students and their families to inform them of the range of unique opportunities they offer. A novel rule of law, like the one urged by the TSSAA in this case, that abridges the right of member schools to convey truthful and valued information, ostensibly on the basis that such schools have availed themselves of opportunities to participate in the TSSAA or other state regulatory programs, unduly burdens the flow of important information between schools and prospective students and needlessly strikes at the core of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals correctly determined that the recruitment rule ("Recruiting Rule" or "Rule") promulgated and enforced by the TSSAA—previously found by this Court to be a state actor due to its symbiotic relationship with the Tennessee State Board of Education—was an overbroad regulation of speech that, when properly subjected to "intermediate scrutiny" under a traditional First Amendment analysis, could not survive constitutional challenge as applied to Brentwood. Petitioner, joined by the Solicitor General as *amicus curiae*, argues for reversal by this Court principally on grounds that the regulatory restraint imposed on speech in this instance derives from Brentwood's "voluntary" or "contractual" participation in the TSSAA and not from an exercise of sovereign power, which, they insist, thus requires more deferential review than accorded below and should lead

to upholding the constitutionality of the TSSAA's actions. Yet, the law is and, we respectfully submit, should remain otherwise, as the Sixth Circuit majority determined.

This Court previously concluded that the TSSAA is a state actor, and no good reason has been suggested to revisit that decision. The "entwined" relationship between the State Board of Education and the TSSAA remains unchanged since the Court's earlier decision. Nor is there any suggestion on this record, or otherwise, that, in regulating athletics among high schools and middle schools throughout the State of Tennessee, the TSSAA acts under the auspices of anyone other than the State Board of Education, or that its enforcement decisions are made for any purpose other than to further the State's educational interests. Indeed, the TSSAA insists that it undertakes its regulatory activity solely to advance three interests of the State (not of the TSSAA): to keep high school athletics subordinate to education; to protect student athletes from exploitation; and to foster competitive equality on the playing field among member schools.

The Recruiting Rule was fashioned by the TSSAA for the State Board of Education and, in 1972, was openly embraced by the State Board through its review and specific approval. It has since been revisited, but not changed, on multiple occasions, each time under the watchful eye of the State Board, and with the State Board's full endorsement. Never has it been suggested—until legal arguments in this case—that the TSSAA either regarded or treated its Recruiting Rule as simply a contractual obligation. The Rule was handed down by the TSSAA for and on behalf of the State as a regulation on recruitment having equal application on member schools throughout the State, adopted and thereafter presented very much as an exercise of sovereign

power, and nowhere portrayed as merely a negotiated contractual provision.

This Court has long emphasized that First Amendment rights are not abridged or, as the TSSAA argues, "waive[d]," *see* Pet. Br. at 21-22, merely because the speech restriction derives from "voluntary" acceptance of, or participation in, a government benefit. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958). To be sure, Supreme Court precedents involving government employees and federally funded programs have carved out modified First Amendment principles applicable to those particular cases, but this Court has been careful to limit application of those modified tests to fit the unique circumstances presented. For good reason, it has never extended those holdings to any situation that even remotely resembles the circumstance where, as here, a statewide regulator constrains the free-speech rights of one of its constituents (not one of its employees) through a restriction wholly unrelated to government funding of its own speech. Accordingly, the court of appeals was correct in holding that, to the extent the exercise of regulatory authority by the TSSAA restricted speech, it was, at a bare minimum, subject to "intermediate scrutiny" under the First Amendment.

It thus was incumbent upon the TSSAA in order to survive constitutional challenge first to show that its Recruiting Rule furthered a substantial governmental interest. The Sixth Circuit examined the three state interests asserted, and upheld the trial court's finding that two of the three had been shown to be substantial (*i.e.*, subordinating athletics to academics and non-exploitation of student athletes), but that no such showing had been made by the TSSAA for the third interest offered (*i.e.*, achieving "competitive equality on the playing field").

Both the TSSAA and the Solicitor General argue that this third interest is so "self-evidently important" that it can be taken on faith, and the TSSAA should, therefore, not have been faulted for its failure to provide an evidentiary basis for the assertion that "competitive equality" is a substantial governmental interest. Yet, the secondary support they offer for their "self-evident" proposition shows only that the sporting community regards "competitive equality" as important for college athletics and the professional ranks, whether to maintain the line between amateur and professional athletes (NCAA), or to enhance the competitiveness and revenues of professional sports (NBA and NFL). Nowhere does it appear that there is any particular state interest, much less a substantial one, in achieving competitive parity in interscholastic sports at the grade school level—as opposed, for example, to having an abiding interest in preventing illegal recruitment (*i.e.*, use of money or gifts), or the enrollment of academically ineligible athletes—nor, of equal importance, why it should be assumed otherwise. That is not to say that a State could not, perhaps, make such a showing, but rather to underscore that the proposition is far from self-evident, that (aside from arguments of counsel in this case) it appears not to have had much practical application among the TSSAA member schools over the years, and that, as the court below correctly held, the TSSAA failed in this case to make the showing needed to establish what it asks this Court to take on faith.

Nonetheless, given that at least two substantial state interests were identified, and even taking the third on faith for present purposes, it still remained incumbent upon the TSSAA under the First Amendment to show that application of its Recruiting Rule to Brentwood Academy in the circumstances of this case was appropriately tailored so as not to burden more speech than necessary to serve the stated government purposes. With specific reference to the

Academy's Spring practice letter and its coach's follow-up calls, the appeals court correctly held that this showing had not been made.

It is unquestioned that the Rule leaves the TSSAA wide enforcement discretion. In broad terms it prohibits "the use of undue influence" on students or their parents by "any person" (whether or not connected with the target school) to "secure or retain a student for athletic purposes." *Brentwood Academy v. TSSAA*, 442 F.3d 410, 416 (6th Cir. 2006). While there is general guidance suggesting that "undue influence" will be regarded as anything (including speech) that "exceed[s] what is appropriate or normal," *id.*, the TSSAA is the sole and final arbiter of appropriateness and normality.

There is thus a strong argument that the Rule fails First Amendment scrutiny facially. It bans "undue influence" without sufficient definition or guidance (other than "what is appropriate or normal") to make clear what is and is not offensive speech; it includes not only school personnel within its wide net ("persons connected"), but also others having no relationship whatsoever with or to the target school (persons "not connected"); it imposes a "no contact" prohibition on coaches prior to a student's enrollment, even as to "appropriate or normal" contacts of a non-recruiting nature (such as the informational letter and calls in the present case), and defines "enrollment" as student attendance at a school for 3 days. As such, whether regarded as a content-neutral time, place or manner restriction on speech, or as one that is content-based (with the focus being essentially on the content of the message and its effect on the listener),[2] the Rule on its face sweeps far too broadly, going

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[2] *See* Brief of *Amicus Curiae* Association of Christian Schools International.

well beyond speech constraints on impermissible recruitment by school personnel necessary to protect the state interests said to be at stake.

Even as more modestly considered by the court below, the Sixth Circuit's finding of unconstitutionality, as applied, cannot be faulted. The school letter and coach's calls did no more than extend an invitation to Spring football practice to incoming freshmen already committed to attending Brentwood classes and emphasized that participation was strictly optional. It certainly can be argued that the communications were not in these circumstances intended "to secure or to retain [any of the already committed and enrolled freshmen] student[s] for athletic purposes." More to the point, the speech in question in no way undermined the State's primary academic interests, nor remotely threatened to exploit student athletes; and it clearly had no effect whatsoever on the stated interest of "competitive equality," since all those contacted were, well before, already Brentwood bound. The court below thus correctly found that, as applied to Brentwood's Spring practice letter and the follow-up phone calls, the TSSAA's finding of a violation of its Recruiting Rule served no legitimate substantial state interest and thus impermissibly interfered with First Amendment speech rights.

ARGUMENT

I. THE TSSAA's ENFORCEMENT OF ITS RECRUITING RULE CONSTITUTED STATE ACTION TO WHICH FIRST AMENDMENT PROTECTIONS APPLY

If the TSSAA could have its way, it would have no serious need to pay heed to its members' First Amendment rights, at least not with more than a passing glance, because constitutional protections against regulated speech would

have no direct application to an entity like the TSSAA, at least not with anywhere near the same force as they might apply elsewhere. Thus, its argument of first order, in hopes of avoiding constitutional scrutiny of its Rule altogether, is to ask this Court to revisit its holding in *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001) (hereinafter "*Brentwood I*") that the TSSAA is a state actor. Pet. Br. at 46-50. Failing that, the TSSAA, joined by the Solicitor General as *amicus curiae*, further argues that, because the TSSAA is akin to a "voluntary" or "contractual" government program in which Brentwood chose to participate, Brentwood essentially acquiesced in speech restrictions included in the Recruiting Rule as a condition of membership so long as those restrictions reasonably related to legitimate government interests, and, under that standard, Brentwood has no cause for complaint that the Spring practice letter and follow-up calls were held by the TSSAA to violate the Rule. *Id.* at 20-32. Brief of Solicitor General ("SG Br.") at 10-18. Neither argument provides a basis for reversal of the decision below.

A. There Is No Basis to Reconsider *Brentwood I*

This Court should not revisit its holding in *Brentwood I* that the TSSAA's "regulatory activity [against Brentwood] may and should be treated as state action." 531 U.S. at 290. The Court's majority there properly concluded that the TSSAA, as a statewide association incorporated to regulate athletic competition among public and private high schools, was a state actor, and, in fashioning and enforcing its athletic regulations, it engaged and is engaging in state action. This holding in *Brentwood I* was well founded, not just because the TSSAA traditionally had been authorized and seen to regulate in lieu of the State Board of Education's exercising its own authority, *id.*, nor because the State Board of Education repeatedly recognized (and, in 1972, by formal "designation" charged) the TSSAA as the regulator of

interscholastic athletics for public and private secondary schools statewide, but also because the TSSAA includes virtually all public schools in the state of Tennessee, acts solely through the public schools' representatives, draws its officers from public school principals only, and derives much of its funding from the dues paid by its public members and from "income received in their stead." *Id.* at 290-93.[3]

The TSSAA urges reconsideration of *Brentwood I*, not due to changed circumstances or intervening developments in the law (neither of which exists), but on a recycling of its earlier arguments. Yet, the contention that the TSSAA's enforcement of its Recruiting Rule against Brentwood can be regarded as independent action because the State itself played no role in the enforcement decision or action (Pet. Br. at 46-47) was addressed and fully answered by the Court's majority when the case was heard earlier. Nor was *Brentwood I*'s holding of the TSSAA as a state actor a departure from prior precedent. Previously, in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), this Court similarly observed that an organization regulating interscholastic athletics whose "membership consist[s] entirely of institutions within the same State, many of them public institutions created by the same sovereign" should properly be regarded as engaging in state action when it enforces its rules against a member. *Id.* at 193 n.13; *see also Amicus* Brief filed by National Women's Law Center.

There is thus no cause to revisit *Brentwood I*. The closely entwined, symbiotic relationship between the State Board of Education and the TSSAA, as overwhelmingly

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[3] While the TSSAA has private schools as members, such as Brentwood Academy and Father Ryan High School, no private school representative is, or ever has been, an officer of the TSSAA or sat on its governing board. *Cf.* 531 U.S. at 299.

established by the record evidence in this case, allows for no conclusion other than that the TSSAA, as the authorized regulator of interscholastic athletics for all public schools and private member schools throughout the State, was operating at all times as a state actor. *Brentwood I*, 531 U.S. at 290. Nor can there be any question that a state actor (like the TSSAA) always engages in state action when acting within the scope of its regulatory authority, as, in the present case, when enforcing its own Recruiting Rule. *See, e.g., Griffin v. Md.*, 378 U.S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action.").

B. Brentwood Did Not Voluntarily Surrender Any Measure of First Amendment Protection by Participating in the TSSAA

It is further argued, however, that, even as a state actor, the TSSAA should be accorded considerable deference in its regulation of members' speech, because the participation of Brentwood and others is said to be "voluntary" or "contractual" by nature. *See* Pet. Br. at 20-32; SG Br. at 9-25. On this reasoning, the TSSAA and the Solicitor General maintain that the Sixth Circuit's application of traditional "intermediate" scrutiny to ascertain the constitutionality of the TSSAA's speech restrictions on Brentwood was in error. We respectfully disagree, and submit that the authority offered in support of adopting a more deferential First Amendment review standard in this case has little application to the present circumstances and provides no justification for a departure here from the "intermediate" scrutiny utilized below.

Our starting point necessarily is with *Brentwood I*'s holding of the TSSAA as the recognized statewide regulator of interscholastic secondary school athletics in Tennessee.

531 U.S. at 290-91. As such, its enforcement of its rule against TSSAA members, including Brentwood, amounts to statewide exercise of regulatory power that, contrary to the TSSAA's assertion, stands on much different footing under this Court's First Amendment jurisprudence than a state actor acting as a contract employer, an independent contractor, or a funding entity intent on promoting a particular government message.

In those latter instances, it was the particulars of the relationship—whether it be employer-employee, independent contractor, or funding beneficiary—that allowed for a bit more play in the First Amendment joints in the area of speech. As this Court has heretofore noted, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). Moreover, those interests such as "promoting the efficiency of [government] services through its employees" (*Pickering*, 391 U.S. at 568), and "'[maintaining] proper discipline in the public service'" (*Connick*, 461 U.S. at 151 (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882))), are recognized as applying with equal force to government contractors. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("The similarities between government employees and government contractors with respect to [freedom of speech] are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption."). Just this past year in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006), this Court underscored the vital interests that are highly unique to the government employee and contractor speech arena:

> Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick*, *supra*, at 143, 103 S. Ct. 1684, 75 L. Ed. 2d 708. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Similarly unique interests were also at issue in *Snepp v. United States*, 444 U.S. 507 (1980), another of the government employee cases relied upon by the TSSAA and the Solicitor General. There, in upholding the "no publication without government prior approval" restriction against a former CIA employee, the Court emphasized that "Snepp's employment with the CIA involved an extremely high degree of trust" based upon the government confiding to him, as employee, highly secret and classified information important to U.S. national security. *Id.* at 510-11. Nothing approaching the unique facts of *Snepp* can be said to exist here.

So, too, with federal funding programs, a degree of latitude in restricting speech has been allowed where the relationship between the grantor and the grantee revolves essentially around promoting a government message. As this Court pointed out in *Legal Servs. v. Velasquez*, 531 U.S. 533, 541 (2001), "'when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to insure that its message is neither garbled nor distorted by the grantee.'" (Quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*,

515 U.S. 819, 833 (1995)). Thus, the restrictions on viewpoint-based speech upheld as a condition of funding in *Rust v. Sullivan*, 500 U.S. 173 (1991), survived a First Amendment challenge only because, as this Court later explained in *Velasquez*, application was limited to where "the government is itself the speaker . . . or . . . the government 'used private speakers to transmit information pertaining to its own program.'" *Velasquez*, 531 U.S. at 541.[4]

None of the rationales offered in those other relationships suggest a basis for permitting the TSSAA, as a regulator of speech, to, in similar fashion, treat its members as employees, independent contractors, or funding partners. The Sixth Circuit thus correctly declined to loosen the level of First Amendment scrutiny that should attach to statewide regulation of interscholastic athletics.

Nor does characterizing Brentwood's membership in the TSSAA as "voluntary" or "contractual" require any different conclusion on the supposition, offered by the TSSAA, that Brentwood "effectively waive[d] . . . any challenge to the conditions" imposed by the TSSAA. *See* Pet. Br. at 21. This Court has routinely cautioned against

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[4] The government subsidy cases are wide of the mark for other important reasons as well. In all of the federal funding or subsidy cases cited by the TSSAA and the Solicitor General, the participant did not need the funding in order to carry on the activities sought to be encouraged by the funding. The federal assistance was purely a subsidy to encourage (*not* enable) the behavior sought by Congress. Thus, in both *Rust* and *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), program participants—family planning centers in *Rust* and libraries in *Am. Library Ass'n*—could and, in some instances, did carry on activities encouraged by the federal program without subsidies from the government. In this case, there is no dispute that Brentwood and Father Ryan (and, for that matter, any other secondary school in Tennessee) would be unable to participate in interscholastic athletic competition in Tennessee without membership in the TSSAA.

regarding the" voluntary" acquiescence in a regulated government benefit as a waiver or effective waiver of First Amendment rights.

In *Speiser v. Randall*, 357 U.S. 513 (1958), for example, the Court long ago admonished that any conditions placed upon benefits offered by a state actor "cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (citing *Speiser*, 357 U.S. at 526). In *Speiser*, the Court invalidated a condition that limited tax exemption availability to war veterans who affirmed that they did not advocate the overthrow of the U.S. Government by unlawful means. 357 U.S. at 514-15. While the state was under no obligation to afford such an exemption, and those that availed themselves of the exemption did so voluntarily, the Court held that imposition of such a condition upon a public benefit inevitably chilled the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly." *Id.* at 526.

In *Sherbert*, the Court again rejected an attempted interference with First Amendment freedoms that was being justified as permissible because the restraint came from voluntary or contractual participation in a government program, rather than from a naked exercise of sovereign authority. In invalidating a state regulation that conditioned unemployment compensation benefits on the applicant's ability to work on Saturday, which infringed the plaintiff's First Amendment right to observe her day of Sabbath, the Court declared:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that

> unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 404. Significantly, the Court expressly rejected the government's arguments for a relaxed or deferential analysis of the First Amendment restriction at issue and, instead, applied strict scrutiny analysis in striking down the restraint. *Id.* at 406.

More recently, in *Velasquez*, 531 U.S. at 533, the Court again held that one of the conditions imposed by Congress on the states' use of federal funds for legal services for the indigent—*i.e.*, that such funds not be used in an effort to amend or otherwise challenge existing welfare law—violated the First Amendment rights of fund recipients and their clients. *Id.* at 536-37. The Court refused to relax its First Amendment analysis based upon the "voluntary" nature of the program or the "choice" that fund recipients had to reject the funds.

Brentwood's "voluntary" participation in the TSSAA no more compromised, or implied a waiver of, its free-speech rights under the First Amendment than the claimed "voluntariness" of those program participants in *Speiser*, *Sherbert*, and *Velasquez* lessened the need for exacting judicial vigilance of their First Amendment complaints. As a high school participating in interscholastic athletic competition under the regulatory regime promulgated and enforced by the TSSAA, Brentwood should not and does not stand on any different footing from the voluntary recipients of legal service funds in *Velasquez*, the war veterans voluntarily seeking tax benefits in *Speiser*, or the individual

availing herself of the state's unemployment program in *Sherbert*.

Just as the Court in each of those cases refused to alter the First Amendment rights of those litigants by according greater deference to the state, it should refuse to do so here. That is especially so because, as recognized by the district court, "the TSSAA is effectively the only game in town" for any high school wishing to maintain an interscholastic athletic program in the state. *Brentwood Academy v. TSSAA*, 304 F. Supp. 2d 981, 997 (M.D. Tenn. 2003). Thus, while the complainants in *Speiser*, *Sherbert*, and *Velasquez* may have had a realistic "choice" of not participating in the government programs at issue—which still did not save the speech restrictions from heightened scrutiny in those cases—any notion that Brentwood's participation in the TSSAA is truly "voluntary" is, as the district court specifically found, wholly illusory. *Id.* at 997. Thus, the court of appeals correctly applied intermediate scrutiny to the Recruiting Rule, and no reasoned basis has been offered to disturb that decision.

II. PROPERLY SCRUTINIZED, THE TSSAA'S RECRUITING RULE FAILS CONSTITUTIONALLY

A. The Recruiting Rule Is Void for Vagueness and Overbreadth

While we believe the court below correctly determined that the Recruiting Rule, as applied to Brentwood, unconstitutionally restricted speech insofar as it condemned the Spring practice letter and phone calls (*see* discussion at Part II.B, *infra*), we are also of the view that the Rule, as written, is too vague, and its speech restrictions sweep too broadly, to survive facially. While *amici* the Diocese of Nashville and Father Ryan High School would

have no such constitutional concerns with a well-crafted and narrowly tailored rule against recruiting, the current wording of the existing Recruiting Rule is so imprecise and open-ended that the TSSAA has virtually unbridled discretion to needlessly and unjustifiably burden free speech in the name of regulating interscholastic athletics.

This Court has long admonished that "'precision in regulation must be the touchstone in an area so closely touching our most precious freedoms . . . . Because First Amendment [rights] need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Keyishian v. Bd. of Regents of NY*, 385 U.S. 589, 603-04 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-38 (1963)). Where, as here, the regulation at issue "interferes with the right of free speech," a particularly "stringent vagueness test" applies. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Nor has this Court shown any reluctance to embrace facial attacks to state regulations that restrict freedom of speech "where the defect in the [regulation] is that the means chosen to accomplish the state's objectives are too imprecise, so that in all of its applications [it] creates an unnecessary risk of chilling free speech." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984).

The Recruiting Rule of the TSSAA is wholly lacking "'terms susceptible of objective measurement,'" *Keyishian*, 385 U.S. at 604 (quoting *Cramp v. Bd. of Pub. Instruction of Orange County*, 368 U.S. 278, 286 (1961)), and plainly suffers from overbreadth. It expansively prohibits the use of "undue influence" on a student or his or her parents or guardians by "any person connected, or not connected" with the school to recruit a student for "athletic purposes." Does the measure of "undue influence" rest with the student, his or her parents, a school official, a person not at all connected

with the school, a TSSAA representative, or, perhaps, some combination of perceptions from this list? That is a question left unanswered by the Rule. Plainly, "undue influence" is a far more subjective than objective criterion that can predictably be viewed differently in the eyes of different beholders. That which might understandably be regarded as of no particular influence (let alone undue influence) to a student or his/her parents—such as the letter and phone calls at issue here—could be considered by an uninvolved third party on hindsight—such as the TSSAA—as undue influence. A rule that subjects the First Amendment right of speech to so nebulous a restraint, capable of being wielded with impunity on the subjective whim of a state-appointed regulator, is constitutionally offensive under any and all of its applications. *See Houston v. Hill*, 482 U.S. 451, 465-66 (1987) (invalidating ordinance with terms susceptible to "open-ended" interpretations).

Nor do the non-binding interpretive guidelines of the TSSAA provide a cure. Their guidance is that "undue influence" may be regarded as "exceeding what is appropriate and normal." Indeed, the TSSAA advises that the "major theme" of its Recruiting Rule is "exceeding what is normal and appropriate." Yet, the terms "appropriate" and "normal" are nowhere defined in the Rule or elsewhere, and, insofar as we have been able to determine, are devoid of "settled usage or tradition of interpretation in law." *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1049 (1991). Members of this Court have repeatedly recognized as much. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24-25 (1981) (holding that the phrase "appropriate treatment" is too vague to be enforceable); *Vaca v. Sipes*, 386 U.S. 171, 201 (1967) (Fortas, J., concurring) (labeling as "exceedingly vague" the term "appropriate damages" to describe available remedy); *Tory v. Cochran*, 544 U.S. 734, 740 (2005)

(Thomas, J., dissenting) (emphasizing that the term "any appropriate party" is vague).

No less than with the term "undue influence," the terms "appropriate" and "normal"—and, certainly, what "exceeds" conduct that is "appropriate" and "normal"—invite numerous interpretations that depend solely on a subjective viewpoint, although it is far from clear under the Rule exactly whose viewpoint. Whatever the governmental interests to be served (*see* Part II.B, *infra*), if restrictions on speech are deemed necessary to further those interests, the First Amendment demands that they be applied with a scalpel, not a sledgehammer, so as not to unnecessarily intrude on the right to speak freely and openly. *See Joseph H. Munson, Co.*, 467 U.S. at 967-68. Under all its applications, the present Recruiting Rule violates that constitutional command.

The vagueness of the Rule's operative terms is further aggravated by imprecision elsewhere in its text, which finds no helpful enlightenment in what the TSSAA offers as guidelines. For example, the phrase "to secure or to retain a student *for athletic purposes*" is left to open-ended interpretation. *See Hill*, 482 U.S. at 465-66 (invalidating ordinance with terms susceptible to "open-ended" interpretations). Is a high school communicating for an "athletic purpose" if it includes a paragraph about its interscholastic athletic program in a written communication about the school's curriculum and extracurricular activities to a number of eighth graders who are talented in arts and sciences, music, mathematics, *and* athletics? If the school's communication is to *all* incoming students regardless of their interest or prowess in sports, as was the case with the Brentwood communications here, should an "athletic purpose" be assumed? In this instance, as indicated, those who were contacted were students who had already signed

enrollment contracts and committed to attend the high school. Yet, remarkably, the contact was found by the TSSAA as intended "to secure or retain a student for athletic purposes." *See* pp. 23-27, *infra*.

The explanation by the TSSAA that its Recruiting Rule imposes what amounts to a "no contact" rule on high school coaches provides no justification. To the contrary, that feature only underscores the Rule's overbreadth, condemning all communications by a coach with prospective students or their parents, even if (as here) "appropriate" and "normal," because the TSSAA, as an exercise of its unfettered discretion, *deems* any such contact to be per se "undue influence." Moreover, by defining "enrolled" to mean that a student has "attended 3 days of school" it would appear that a coach can have no contact with fully matriculated freshmen for their first days of class attendance, even during, for example, TSSAA sanctioned football practice, for fear of violating the Recruiting Rule. So unnatural an interpretation that allows wholesale encroachment by a state actor on First Amendment expression simply cannot be constitutionally tolerated. *See Griffin v. Wis.*, 483 U.S. 868, 876 n.3 (1987) (finding that the state court could not constitutionally adopt so unnatural an interpretation of the language that the regulation would fail to provide adequate notice); *cf. Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); *Lambert* v. *Cal.*, 355 U.S. 225, 228 (1957).[5]

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[5] The defectively overbroad nature of the Recruiting Rule is further highlighted by the "feeder pattern" exception reflected in the Rule's Guidelines. The Guidelines prohibit initial or prearranged contact with middle school students at the TSSAA member and non-member schools by a high school coach or other school representatives except where there is a "feeder pattern." No reasoned basis for distinguishing between "feeder patterns"—itself an undefined and vague term—and other

This Court has never hesitated to strike down a regulation, like the instant Recruiting Rule, that sweeps too broadly or is plagued by open-ended imprecisions that chill the free flow of constitutionally protected speech. In *Hill*, for example, the Court invalidated a city ordinance that prohibited individuals from "in any manner oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty . . . ." 482 U.S. at 455 Much like the terms "undue influence," "appropriate" and "normal" associated with the TSSAA's Rule, enforcement of the ordinance in *Hill* rested on essentially subjective terms without any discernible objective content—*e.g.*, "oppose," "abuse," and "interrupt"—that lacked any meaningful particularization. There, the Court invalidated the ordinance on vagueness grounds and, in the process, firmly declined the government's entreaty to uphold the validity of the ordinance out of deference for the compelling public interest in effective law enforcement. Finding the First Amendment's guarantees too precious to surrender to such loosely worded proscriptions, the Court struck down the ordinance as a particularly offensive example of constitutional imprecision that gave rise to intolerable intrusions on "a substantial amount of constitutionally protected speech, and accord[ed] the police unconstitutional discretion in enforcement." *Id.* at 466.

The same result was reached in *Kolender*, 461 U.S. 352, where the Court invalidated a statute that required persons who wandered on the streets to provide, upon request

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situations has been offered, and it is particularly difficult to discern what governmental interest (let alone substantial governmental interest) conceivably justifies the TSSAA treating the benign Spring practice notices in this case, where the students contacted had already signed enrollment contracts with Brentwood and paid the required deposit, with so much more hostility than it has elected to treat similar notices sent by a high school coach to students at a "feeder" school.

by a government official, a "credible and reliable" identification. Characterizing its concern with the legislation as a vehicle having the "potential for arbitrarily suppressing First Amendment liberties,'" *id.* at 358 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965)), the Court found the words "credible and reliable" to be essentially standardless, thereby leaving too much enforcement discretion in the hands of government officials. *Id.* at 358. As there observed, "as weighty as th[e] concern [with curbing criminal activity] is, . . . it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.* at 361.

As has regularly been pointed out, these void-for-vagueness and overbreadth cases serve a number of important values, including assuring that individuals know what types of conduct are prohibited, discouraging arbitrary and discriminatory enforcement, and avoiding the risk of inhibiting the exercise of First Amendment freedoms because those subject to the rule will "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). All of these values are directly implicated with enforcement of the TSSAA Recruiting Rule. Its invalidation as a facially unconstitutional encroachment on First Amendment rights of free speech is, therefore, entirely warranted.

B. The Recruiting Rule as Applied by the TSSAA to Brentwood Is Unconstitutional

Even if the Court is unprepared in this case to find the Recruiting Rule facially unconstitutional, it certainly should affirm the Sixth Circuit's ruling that the TSSAA's enforcement of the Rule against Brentwood violated the

Constitution. The Brentwood letter and phone calls invited incoming freshmen already committed to Brentwood Academy to Spring football practice, and emphasized that attendance was strictly optional and should not interfere with any of their other school activities. It certainly can be argued that the communications were in these circumstances neither intended "to secure [n]or to retain [any of the already committed freshmen] student[s] for athletic purposes." Given that Spring football practice was at the time a sanctioned activity by the TSSAA, to conclude that the coach's notification letter and phone calls amounted to "undue influence"—especially when neither the students nor their parents regarded the communications as either inappropriate or abnormal—impermissibly stretches the definition of "undue influence" well beyond its constitutional breaking point.

Applying intermediate scrutiny, the court of appeals agreed with the trial court's findings that, while two of the three state interests asserted by the TSSAA for its Recruiting Rule (*i.e.*, keeping athletics subordinate to academics and preventing "exploitation" of student athletes) were substantial, the TSSAA failed to satisfy its burden of proving that maintenance of a competitive playing field in high school athletics is a third substantial state interest served by the Rule. The court below further concluded that the "TSSAA did not show that the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests." *Brentwood Academy*, 442 F.3d at 430.

Contrary to the contention of the TSSAA and the Solicitor General, the Circuit Court committed no error in declining to find, based upon counsel's *ipse dixit* and little else, that "competitive equality" in high school athletics could legitimately be regarded as a third substantial state

interest. The TSSAA complains that, even if probative evidence is lacking, the Sixth Circuit can be faulted for not exercising its own "common sense," *see* Pet. Br. at 33, as sufficient basis for accepting the "competitive equality" interest as self-evident.

Yet, common sense would seem to dictate the very opposite conclusion from the one urged by the TSSAA and the Solicitor General. As established in the district court, 304 F. Supp. at 984-85, the State undeniably has a strong interest in keeping athletics subordinate to academics. It is thus intuitively doubtful that the State would regard the promotion of athletic competitiveness among the TSSAA member schools as anywhere near the "self-evident" importance that has been suggested. Indeed, undertaking to maintain a school's athletic competitiveness vis-à-vis other member schools would appear to introduce far more emphasis on sports programs than their subordinated status in the State's hierarchy seems to anticipate, which could well leave the overarching academic interest more, rather than less, vulnerable to athletic agendas.

Nor do the secondary materials referenced by the TSSAA to nonetheless introduce a "competitive equality" state interest by force of *ipse dixit* help its cause. At most, these materials stand for the unremarkable proposition that "cooperat[ion] off the field" helps competition "on the field," *see* Pet. Br. at 34 (quoting Paul C. Weiler, *Leveling the Playing Field 2* (2000)); or that competitive balance is important to the marketability and revenue stream of professional sports, *id.* (citing *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) and *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978)); or that the NCAA views its eligibility requirements as important to maintaining the line between college and professional athletics. *Id.* at 35. Nowhere is there even the hint of a suggestion that

maintaining "competitive equality" at the high school level is a substantial government interest that could justify encroachments on freedom of speech.

Nor did the lower court err in concluding that the TSSAA's punishment of Brentwood for the speech involved here imposes a far greater burden on First Amendment rights than is necessary to further any of the governmental interests implicated. As the Sixth Circuit noted, the coach's communications about Spring football practice came well after all of the recipients had made their decision to enroll in Brentwood and signed an enrollment contract. Abundant other information extolling the virtues of Brentwood had previously been received and digested by the students and their parents. The TSSAA makes no suggestion that this prior information disserved the stated government interest of keeping athletics subordinate to academics. It strains credulity to suggest that an isolated notice of Spring football practice later received by those already committed to the school so threatened to subordinate the primacy of the academic mission as to demand punishment under the Recruiting Rule, particularly when none of the students notified had ever signaled that they were having second thoughts or reservations about their decision to enroll at Brentwood (*and see* note 5, *supra*).

Likewise, the speech punished here cannot reasonably be said to be a form of exploitation of student athletes that endangered the second stated government interest served by the Rule. The coach's communications, first by letter and then by follow-up phone calls, were nothing more than notification of a TSSAA authorized activity (Spring football practice) *open to all Brentwood students*. The recipients were not singled out for their athletic skills or, as with colleges, because they were on an athletic scholarship. Rather, they received notice because, and only because, they

had chosen to enroll in Brentwood Academy, and football was one of the extracurricular activities that the school offered to all enrollees. Perhaps if the coach had been more selective in his mailing and calls, targeting, for example, only those regarded as the most athletic prospects, one might have been able to argue there existed some element of "exploitation." But, that admittedly did not occur. Nor was there an effort to "lean on" or otherwise influence anyone to attend Spring practice—say, for example, the larger and more skilled players—or any endeavor to promote the Brentwood football program in any respect. Indeed, information about Brentwood football had been distributed to these students previously through accepted "alternative avenues of communication." Accordingly, as the courts below found, in this instance "[n]either students nor parents were exploited in theory or in fact" (442 F. 3d at 428), and the speech prohibition in question thus imposed a far greater burden than necessary to further the government's interest in protecting student athletes from exploitation.

The sole reason—if any—to recognize the third proffered government interest, "competitive equality," as a substantial government interest could only be "on faith." Even so, it is hard to envision how a notice of Spring practice mailed to already enrolled students of Brentwood—simply as enrollees and without regard to their athletic prowess—is speech that in any respect threatens to undermine the interest of "competitive equality." The recipients' enrollment decision was not still hanging in the balance, nor (at least on this record) one that appeared wavering or at all unsettled. Whatever competitive advantage Brentwood may derive from that decision, or disadvantage that others may experience on the football field, that die was cast well before the coach's letter and phone calls and remained unaltered by notification of Spring practice. The TSSAA's punishment of Brentwood for these communications thus prohibits far more

speech than necessary to further the interest of "competitive equality," whatever may be the importance of that alleged state interest. It is, therefore, as constitutionally wanting under this "substantial government interest" argument as the other two and, as here applied, amounts to an unconstitutional interference with First Amendment rights that cannot stand.

Both the TSSAA and the Solicitor General urge this Court, notwithstanding, to leave such constitutional transgressions alone because to do otherwise is to drag the courts into second-guessing the day-to-day decisions of the TSSAA (and other such athletic associations) in the field of recruitment, as well as many other fields. While we are unconvinced that an "as applied" decision in this case will have such consequences, where a state actor undertakes to regulate speech in broad and ill-defined terms (such as "use of undue influence," or all persons "connected, or not connected," or "for athletic purposes"), it is all the more imperative for the courts to remain vigilant that discretion resting with the state actor charged with enforcement should not be exercised in a manner that needlessly encroaches on First Amendment rights.

Free speech is the first among our constitutional amendments and has been identified by this Court as the most important star in the galaxy of our basic freedoms. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Consequently, government interference, if allowed at all, is to be tolerated only in the most compelling of circumstances and only on the narrowest of terms necessary to serve legitimate, substantial

governmental interests. The courts' role as judicial watchdog in this area cannot be minimized; it stands as the last (and only) refuge against government erosion of First Amendment guarantees. This is no less true in the area of interscholastic athletics than in any other area. Thus, any suggestion that the TSSAA (or any other similar enforcement arm of a State) should have wide-ranging discretion to regulate in furtherance of an overarching government interest to insure that interscholastic academics are not athletically compromised, without judicial supervision over restrictions placed on speech, disserves the very purpose of the First Amendment, and cannot be countenanced. The Sixth Circuit decision must, therefore, be affirmed.

CONCLUSION

Respectfully, for the reasons stated above as well as those in Respondent's brief, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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